

CONVENTIONAL ARMS EXPORT CONTROL REFORM: CUTTING THE GORDIAN KNOT

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ABSTRACT

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The United States' export control system is too complicated and overly restrictive as multiple agencies enforce multiple antiquated laws and regulations. The export control system is oriented to Cold War conditions with a singular threat and a U.S. military technology industry that led the world in technology development. In today's environment, commercial demands lead technology development, not military needs. Many parts of the world have caught up with the U.S. in technology innovation leading to a fast paced highly competitive global technology market place. The U.S. export control system is unwieldy leading to over-protection of readily available technology and causing domestic suppliers to avoid the system bringing into question the adequate controls of truly critical technologies. While the Obama administration has made discernible progress towards streamlining the export control system, it needs Congressional support to fully implement its initiatives. This paper offers suggestions for additional measures, and potential alternative solutions absent Congressional help, that will cut the Gordian Knot of U.S. Export Controls and unshackle U.S. competitiveness in arms exports while providing sufficient protection of our key defense technologies.

CONVENTIONAL ARMS EXPORT CONTROL REFORM: CUTTING THE GORDIAN KNOT

The U.S. export system itself poses a potential national security risk. Its structure is overly complicated, contains too many redundancies, and tries to protect too much.¹

—2010 Quadrennial Defense Review

The control and security of U.S. defense technology has been a significant concern since the end of World War II. During the Cold War that followed, security focused on protection from a single well-defined threat – the Soviet Union.² Defense technology requirements drove technology development and the United States' technological capabilities were far superior to the rest of the world.³

Times have changed. In today's environment, commercial demands rather than military needs tend to drive technology development. Many parts of the world have caught up with the U.S. in technology innovation, leading to a fast paced highly competitive global technology market place. Globalization has blurred border lines and business and economic interests have become global.⁴ Additionally, there is an ill-defined myriad of multiple threats with very different capabilities and agendas that seek technology to match or defeat U.S. capabilities.⁵

The United States' conventional arms export control system has become too complicated and is overly restrictive. It has become a Gordian Knot of multiple agencies involved in various ways to enforce multiple antiquated laws and regulations, all too often acting at cross purposes. The U.S. arms export control system is unwieldy, leading to over-protection of readily available technology and causing domestic suppliers to game the conflicting rules and agencies against each other. Some believe

the resulting confusion and distrust create such significant ambiguity regarding what should be controlled by whom and why, that it brings into question if there is any control of the truly critical technologies.⁶

While the Obama administration has made discernible progress toward streamlining the export control system, it needs congressional support to fully implement its initiatives. This paper offers suggestions for additional measures and potential alternative solutions, emphasizing the role demanded of Congress, which will cut the Gordian Knot of U.S. export controls and unshackle U.S. competitiveness in arms exports while providing sufficient protection of our key defense technologies.

Current Enforcement Structure

The U.S export laws and supporting bureaucracy established during the Cold War to protect conventional arms technology have changed little in response to shifting economic and security conditions.⁷

There are two primary laws that govern the export control of conventional arms, the Arms Export Control Act (AECA) of 1969, and the Export Administration Act (EAA) of 1978.⁸ This paper will focus on the control of conventional arms and not address the Nuclear Non-Proliferation Act of 1978 and its enforcement by the Nuclear Regulatory Commission.⁹

The AECA gives the President the authority to establish a process to manage the export controls of military technology. The direction included establishing the United States Munitions List (USML) of specific controlled items and the appropriate regulations, International Trade in Arms Regulations, (ITAR), to support implementation of the AECA.¹⁰

In Executive Order (EO) 11958, President Ford distributed the various authorities of the law to different departments within the government. For instance, the Department of Defense (Defense) was designated to manage procurement for cash sales of arms technology and the Department of Commerce (Commerce) controls the export of Uranium 235. The Department of State (State) was given the authority to establish and enforce the regulations and USML in coordination with the other departments with export control responsibilities or interests.¹¹

The Export Administration Act (EAA) of 1978, on the other hand, specifically designated Commerce as the responsible agency for establishing licensing requirements, regulations, and control lists.¹² Items are controlled under the authority of the EAA when necessary “based on national security, foreign policy or for the effect of domestic exports on the national economy.”¹³

Commerce maintains the Commercial Control list (CCL) to designate products and technology that must be licensed for export to specific countries under the Export Administration Regulations (EAR). Although items on the CCL are often considered “dual use” technology that has both a military and commercial use, non-military related items often also appear on the list because their control may be for foreign policy or economic reasons.¹⁴ The CCL is a separate and distinct list from the USML. Most in government and industry who work with export controls consider the USML to be the more stringent and critical list because its purpose is to protect the security of purely military technology.¹⁵

The Export Administration Act (EAA) also directs Commerce to coordinate licensing actions with other departments, such as Defense, and it directs defense to

establish the Military Technology Control List to assist in determining what technology should be controlled.¹⁶ Congress recognized that export controls can affect U.S. efforts in foreign affairs and it directed Commerce to ensure it coordinates with State for approval of all arms export control actions.¹⁷

The law authorizes the President to restrict exports of any item when necessary to support U.S. foreign policy objectives such as countering tariffs, boycotts and other trade restrictions and encouraging countries to deny terrorists safe haven or other support.¹⁸ Presidents Clinton and Bush used this extensively to deny exports to Syria, Iran and the Taliban.¹⁹

The EAA last expired in 2001, but Presidents Bush and Obama have continually renewed it under the International Economic Emergency Powers Act (IEEPA), citing the need for the provisions under conditions of national emergency.²⁰ President Obama most recently re-authorized it in August 2010.²¹

These laws and the bureaucratic structure they have created have made control of critical technology exceedingly difficult for companies to comply with and government agencies to manage. Over the years, the laws and lists have diverged in some areas and crossed over in others, but seldom does a controlled item come off the lists. Interagency coordination processes have been slow and dysfunctional because each department has different enforcement requirements, technology definitions, and license application requirements and processes.²² Such ineffective coordination is to be expected as inherent in such a convoluted system of government red tape and is only resolvable by dismantling its Rube Goldberg structure.

Another factor that is important to U.S. enforcement of export controls is the concurrent enforcement by our international partners. The U.S. government participates in five arrangements to coordinate international arms controls. Only one, the Wassenaar arrangement, is relevant here as it focuses on conventional arms control. The other four coordination groups focus on particular technologies such as nuclear, missiles, or chemicals and biological agents.²³

The Wassenaar Arrangement is a multilateral export control agreement among 40 countries, including the U.S., to coordinate the implementation of exports of both conventional arms and dual use technologies. The member countries establish a list of technologies to control. Wassenaar is an arrangement and not a treaty or formal agreement that binds the member countries to compliance. Enforcement by member countries is very uneven and there is mistrust that some do not take export seriously or others use it to protect their related industries.²⁴ Industry has complained that there needs to be much more consistency in control definitions and enforcement with our international partners.²⁵

Currently, both the Commerce and State Departments have responsibilities under the Wassenaar Arrangement because both military and dual use technologies apply.²⁶ Responsibility for coordinating export controls with other nations is one of the factors that must be addressed in the streamlining effort. A single voice representing a streamlined export process at home would certainly give the United States a better position to develop more consistent control standards with our partners abroad.

To further complicate the matter, Congress has multiple committees with oversight and budget authority related to export controls. In the House, the Committees

for Foreign Affairs, Commerce and Energy, and Armed Services are a sample of the multiple committees that claim authority over export controls.²⁷ Responsibility for oversight in the Senate is similarly diffused, with Foreign Affairs and Commerce, among others, providing oversight.²⁸ These multiple viewpoints for oversight can only contribute to the complicated mess, particularly if there is any initiative to change that may impact the current authority of any committee.

Broad Recognition of the Issues

Industry, think tanks, and government officials have recognized and discussed these problems for years. The Government Accountability Office (GAO) issued a report in November 2010 that summarized its previous 22 reports over the last ten years on this subject and concluded its findings by stating that it continues to find the same issues with “poor interagency coordination, inefficiencies in the license application process, and a lack of systematic assessments.”²⁹

Industry is frustrated by a slow licensing process, the continued control of items that have been available in the global market for a long time, and by the confusion created by multiple enforcement departments with different lists, interpretations and procedures.³⁰

Some in industry argue that the system unfairly prevents them from competing in the global markets for their products.³¹ Changes to the system could potentially increase business opportunities and have a positive effect on the U.S. economy. One industry trade group estimates that changes to streamline the process would generate over \$60 billion in new business and create 350,000 more jobs.³²

What many in industry would like to see is a single list with a “sunset clause,” where control of a particular technology expires at a specified point in time unless the

government can demonstrate a clear need to extend the controls. The sunset clause could be implemented as part of a regular review process to automatically reduce or eliminate the controls on readily available technology in a timely manner that meets profitable market opportunities.³³ Industry also believes the uneven enforcement by our international partners gives foreign competitors an unfair advantage in access to markets. Any effort to streamline the U.S. export controls must consider mechanisms to level the enforcement standards with our international partners.³⁴

Those more concerned the adequacy of measures to protect U.S. technological superiority point to the cumbersome process and redundant and uncoordinated enforcement policies and procedures as creating holes for critical technology to slip through.³⁵ The process is so complicated that corporations will often choose to avoid engaging it altogether by not marketing the product to the military or not applying for an export license at all.³⁶ License applicants are responsible for trying to decipher the different regulations to determine whether their products are controlled items.³⁷ They also have to determine both the intended end user and intended use to ensure those are not prohibited too.³⁸ All this creates compliance delays and costs that have increased significantly throughout the last decade and that are so cumbersome they are seen as a barrier to export opportunities for small businesses.³⁹

Ironically, the process is so overburdened, protecting so much technology, that it does not adequately protect what is really important.⁴⁰ The lack of focused resources prevents timely investigation of potential export violations leading to a large backlog in closing investigations.⁴¹ The concern is that the government must be more precise in identifying the truly critical technology and then it must streamline the enforcement

infrastructure to better focus the limited enforcement assets on that most important technology.⁴² As an indicator of the magnitude of how much is unnecessarily controlled, the recent administration efforts to streamline just one of the eighteen categories on the USML determined that 74% of the 12,000 items controlled in that one category could be taken off the list or moved to the CCL.⁴³ The CCL contains another ten categories that could see similar results.

The branch of government with the authority to create the comprehensive changes required to address all the issues and concerns, appears to be the most reluctant to do so.⁴⁴ Since 1996, seven bills have been introduced in the 104th through the 110th Congresses to restructure the export control system, but none passed.⁴⁵

The 111th Congress initiated several legislative actions related to the export system yet none of these bills passed. Although Congress did identify in some of these bills the need to improve interagency coordination, they did not give specific direction to do so nor did they address any of the other core systemic problems. Congress tended to focus on additional reporting or enforcement requirements and establishing interagency procedures for educating the public on the current system, efforts that are largely symbolic or operating only at the margins of the real problem. Further, the only reason the President continues to have dual use export control and boycott authority is because he declared a national emergency to invoke the IEEPA and extend the life of the EAA. Congress has not seen the need to address the issue and give the President new authority with the appropriate legislation to support it.

Obama Administration Initiatives

A White House fact sheet describes how changes to the export control system must enhance U.S. security by efficiently and effectively enforcing the U.S. export laws,

controlling the right technologies, and providing a transparent, efficient and easy to use licensing system for industry to comply with U.S. export laws. The changes must also enhance U.S. industrial competitiveness and opportunities in the global market.⁴⁶

In 2009, President Obama initiated a government wide study that concluded the system was too complicated, redundant, overly protective and unable to focus on protecting those technologies that really need protection.⁴⁷ As a result, the administration intends to pursue changes in four component areas or “four singularities: a single export control list, a common information database, one export control agency and one enforcement agency.”⁴⁸

The administration’s initial steps have focused on reducing the redundancies and clarifying the standards for controls between the Munitions List and the CCL, creating a coordination center for interagency enforcement efforts, and modifying a current information technology (IT) system to become the new common infrastructure that includes a common automated licensing application form. Eventually, the Administration intends to seek legislative action that establishes a new separate and distinct export control agency that manages one list. The legislation would also consolidate enforcement coordination authority with one current enforcement agency.⁴⁹

The administration established the Export Control Reform (ECR) task force to streamline the interagency effort under the direction of the National Security Council (NSC). The task force is not a part of the formal NSC staff structure, but is temporary arrangement that facilitates the interagency process through the coordination of subject matter experts from the Departments of Commerce, State, Treasury, Defense, and

other agencies. This task force of subject matter experts has begun to address the issues as identified in the study.⁵⁰

The task force closely coordinates the progress of each initiative and reports the status directly to the NSC Deputies Committee. The Deputies Committee uses the task force to coordinate the implementation of its decisions without following typical interagency coordination procedures including working through the sub Interagency Policy Committee (IPC) and IPC processes. This task force process has proven highly effective by significantly streamlining the decision making and implementation process for the Deputies Committee. It also allows the task force to get policy issues and recommendations directly to the Deputies for approval when required.⁵¹

The reform process is a three-phased approach in each of the four component areas in pursuit of the four singularities. The maturity of the development of a particular singularity will determine its phase. This may be independent of the status of the other singularities.⁵²

The first two phases address the implementation of reforms across the export system to fix the fundamental problems, such as the multiple lists and inconsistent enforcement processes, without changing the interagency structure. The first phase includes establishing the interagency task force process and gaining initial decisions for implementation and the second phase is primarily to implement the decisions.⁵³

Although all of the changes in the first two phases are executive actions that can be implemented without legislation, Congress has provided some legislation to strengthen enforcement in support of the administration's initiatives. For instance, Congress added provisions to the 2010 Iran Sanctions Act that restored Commerce's

law enforcement authorities lost when the Export Administration Act expired. These provisions also standardized and increased the maximum penalties for all export control violations.⁵⁴ The third phase will be to secure the legislative actions necessary to codify the changes to the export control and enforcement agency structures.⁵⁵

The first singularity is the single control list. The process to eliminate the redundancies between the two lists is intended to set the baseline for one export control list until it can be codified through legislation in phase three. The process also has the goal of making the control criteria for the lists more relevant for today's business and security requirements. The lists are to be more "positive lists" that define specifically what is controlled based on "objective" technical criteria and thresholds instead of broad "subjective" lists of items.⁵⁶ For instance, currently the USML lists an end item, such as a tank or aircraft, and automatically includes all the components down to the nuts and bolts as controlled under that item. The goal is to avoid such sweeping and overly inclusive definitions and focus controls on specific critical technology.⁵⁷

When this initial consolidation of the lists is complete, the intent is that there will be "a 'bright line' between the two lists – exporters will be able to know which agency has jurisdiction over their products."⁵⁸ Also, by using technical parameters that describe military capabilities, the administration expects more timely reviews and control changes as technologies mature and become more readily available.⁵⁹

As an additional step to further define critical technology on both lists, the new system will be a three-tiered system designed to focus control efforts on the most critical technologies. The top tier will be the most sensitive military or intelligence technology that will most likely require licensing for any exports. The middle tier will be less

sensitive items that may be licensed to share with our closest allies and multi-lateral partners. The lowest tier will be for less sensitive items that are broadly available and minimal or no controls will be required.⁶⁰

The pilot effort to align the lists has focused on Category VII of the USML – Tanks and Combat Vehicles. The effort for category VII has gone through over 12,000 items and determined that 74% can be moved from the USML to the CCL or have no controls at all.⁶¹

The administration has a favorite example of the kind of results this effort can achieve that involves brake pads for the M1 tank. The brake pads are on the USML and stringently controlled like any other item on that list and yet they are the same pads as found on commercial fire trucks. Moving items like the M1 brake pads to the dual use CCL, or removing the controls completely, makes much more sense than controlling them with the same business limiting restrictions and limited enforcement resources as the other truly uniquely critical items found on the USML.⁶²

Although not complete, the review of Category VII is on track and has encouraged further steps to clean-up the USML and CCL. In December 2010, State released two announcements in the Federal Register, one for seeking public comment on the changes to Category VII and one for comments and recommendations in preparation for the revision of the rest of the USML.⁶³ Commerce also released an announcement requesting recommendations on updating the technical descriptions in the CCL and on determining foreign availability for listed technologies on the list. It released another announcement seeking comment on a change to the EAR allowing a licensing exception for certain items to be exported to low risk countries and locations.⁶⁴

The interagency effort, through the task force, plans to concurrently review all eighteen USML categories and all ten CCL categories on a schedule that goes through 2012.⁶⁵

Streamlining the lists to separate their authorities, tier the controls, and manage by technology instead of by item, should address many of industry's concerns. Although the administration addresses timely assessments of technology controls, that element does not appear to be as well thought through as the initiatives to establish bright lines and tiers. The administration needs to ensure that any legislation to combine the lists includes mechanisms for regularly screening and removing items in a timely manner based on sensitivity and availability.

Industry's long term acceptance will depend on how well the maintenance system works to move items down the tiers and off the list. Industry will likely measure success in terms of one or some combination of four factors: establishment of a reasonably short process for licensing approval (measured in days not weeks or months); the creation of clear criteria for approval and reasonable reasons for disapproval; development of a single list with a very short highest and second highest tier for most stringent controls; and provision of a regular review process that actively and timely moves items down the tiers or off the list to account for global availability.⁶⁶

These initiatives should be acceptable to Congress as they do not impede congressional oversight and budget authorities. In fact, cleaning the lists could make congressional committee review easier as the items that must be controlled will become much more focused. Both the AECA and EAA require reports to Congress before any

items can be removed from the USML or CCL.⁶⁷ This will give Congress the opportunity to review the process and negotiate over any items that may be of concern.

Concurrent with the effort to create a single control list is the effort to create the singularity of one IT infrastructure to manage and coordinate the control and enforcement mechanisms across the government. The Defense Department has the lead to establish this infrastructure.⁶⁸ It intends to use a system it already uses for reviewing export license applications, called USEXPORTS, as the baseline for the new infrastructure. The plan is to create a new interagency coordination system that will include a portal for industry access. An important feature will be a single licensing application used by all the departments and agencies instead of the multiple applications currently used by State, Commerce, and other agencies.⁶⁹

Industry and those concerned with the security of our most critical technologies will appreciate most of these efforts. The effort to establish one application and tracking system should be very well received. However, the GAO found that the USXPORTS effort does not have a specific plan to integrate the enforcement functions.⁷⁰ The efforts to consolidate the IT infrastructure appear to be in the right direction for providing a transparent and easy to use application and tracking system that may encourage compliance. If the departments and agencies still feel compelled to establish separate systems for their “unique” requirements, the affect may be limited and over time the system may stay or fall back to separate stove piped systems.

The next singularity is to establish a single law enforcement agency. President Obama published an executive order in November 2010 establishing an Export Enforcement Coordination Center “(EECC).”⁷¹ The Department of Homeland Security

(DHS) has the lead to provide a director and supporting staff for the center. The EO provides for only four staff members, the DHS director, and two deputy directors: one from the Department of Commerce and one from the Department of Justice, and a liaison from the intelligence community. However, the other departments and agencies with interests in export controls “are encouraged to detail or assign their employees to the Center without reimbursement.”⁷² Voluntary detailing of employees from one federal agency to another has had a very poor track record and a Presidential directive should require minimum staffing levels to be effective.⁷³

The EECC is meant to be a “forum” to coordinate export enforcement efforts and issues across the various government agencies with arms export authorities to include the federal law enforcement and intelligence agencies. The EO specifically directs that it will not change or move any of the responsibilities or authorities already in place.⁷⁴

It is too early to tell how well the EECC will function. The risk is that, as the government begins to implement the expected budget cuts over the next few years, those agencies that are only encouraged to detail staff to the EECC may find that is not a priority. Establishing the EECC within the DHS makes sense for the purposes of coordinating the law enforcement efforts with its Customs role.

A senior White House official who is working with the task force believes the EECC structure will work because it has the power of the President behind it.⁷⁵ The EECC is still a work in progress and one of the important elements to make it successful is the establishment of key memorandums of agreement between departments with enforcement related functions. Some of these agreements have been in negotiations for years, but have not been completed because of deep disagreements between the

various departments. The completion of the enforcement memorandums is a priority for the task force as the agreements are seen as key to strengthening the authority of the EECC.⁷⁶

The objective final configuration is to consolidate much of the export control enforcement under the Immigration and Customs Enforcement agency (ICE). The ICE would also have enforcement coordination responsibility with other law enforcement agencies such as the Federal Bureau of Investigation (FBI) that would still have some export enforcement responsibilities. This final configuration will require legislation to implement.⁷⁷

Industry and those interested in better security will watch the EECC effort to see if it truly gains efficiencies. There is still room for investigative backlogs, missed illegal activities, and uneven enforcement as the overall enforcement effort is still dispersed. The effort to coordinate the lists should assist greatly in creating efficiency by reducing the number of items to be enforced.

Phase Three

The last important step will be placing the control and licensing authority one department or agency that also manages one succinct list. Until that occurs, seams and redundancies will persist and continue to generate confusion and ambiguity over what should really be protected. This is where phase three becomes the most important step in the process. Legislative action to codify all the changes that create the four singularities will be the critical last step to full successful streamlining of the export system not only for the legal basis legislation provides, but also for the Congressional buy-in it should represent.

The Administration's plan is to establish a new and distinct "Single Licensing Agency (SLA)" for the export control function that would look and operate much like the Federal Communications Commission (FCC) or the International Trade Agency (ITA).⁷⁸ The new agency will most likely include elements from the departments that currently have trade control authority and will have a board of governors from the Secretaries of the departments with current export control responsibilities. The legislation would consolidate much of the export enforcement functions of Customs and Commerce under the ICE and give the ICE overall enforcement coordination authority with other federal law enforcement agencies.⁷⁹

Most likely, the legislation for a Single Licensing Agency (SLA) will involve a replacement law for the EAA to ensure the executive branch maintains its authorities to restrict imports to other countries and conduct anti-boycott actions that have made the re-authorizations of the IEEPA necessary. The new legislation would amend appropriate sections of the AECA to move the military technology export control and reporting functions from State to the new agency. However, the purely foreign relations functions of the law, such as coordinating the U.S. position with the Wassenaar agreement, would remain with State.⁸⁰

Retaining the foreign relations portion of export controls with State would be an important step towards steering the international agreements to meet U.S. interests because it would designate one representative U.S. voice to the international community. The administration will want to ensure the new law clearly identifies State as the lead for the international coordination of export controls and that the law requires the SLA and Commerce to support State in its execution of those duties.

The SLA solution would focus one staff on all the efforts associated with export controls and probably achieve a high level of coordination in the list definitions and authorities. However, the greatest drawback is that it would insert another agency into the export control element of foreign policy run by State and it could break the synergy with the other commerce related functions under Commerce. Interdepartmental coordination would be the most significant task for this agency as it would have to coordinate all actions with the departments who would still have relevance and interests in export control. Ensuring open coordination between the SLA and the departments will have to be one of the key duties of the board of governors. Although creating a new agency would not be a panacea for alleviating all the interagency coordination problems occurring today, it would reduce the impact by providing one face responsible for export control policy to industry and the rest of the government.

A recommendation to complete this action would be for Congress to identify one lead committee in each house for oversight responsibility. This could go so far as to establish an entirely new committee as the House Committee on Homeland Security was established to provide oversight of the DHS.⁸¹ A lead or separate committee would have the same consolidating affects in the legislative branch as it would in the executive. The committee would have inter-committee coordination responsibilities much like the SLA would have for execution and provide the benefit of the SLA responding to one committee for oversight and funding.

What else can the Administration do?

The administration has some potential options to consider if legislative support does not appear likely to establish the new SLA and to consolidate enforcement under the ICE. The administration would want to proceed cautiously as the current export

control laws do not support complete consolidation of the control functions and further attempts to consolidate could be perceived as a unilateral attempt to infringe on Congressional authority. Congress could certainly flex its financial authority and block any actions it does not support by withholding funding.⁸²

One option is to designate State as the single enforcing department as export controls. This makes sense as export controls are viewed as a tool in the management of foreign affairs, State can provide one voice in negotiating international export control arrangements, and the USML is viewed as the more stringent and critical list to enforce.

However, the EAA very clearly directs export enforcement of dual use technologies to Commerce. The President could allow the EAA and the direction to Commerce to expire by not reauthorizing the IEEPA.⁸³ By doing so, he would also lose the authority to restrict exports as needed to support U.S. foreign policy interests. Presidents have used this power frequently in the past against countries like Syria and Iran to enforce U.S. security concerns with those countries. The President's action to reauthorize the IEEPA indicates he is unwilling to work outside the framework of the authorities provided in this law.

Should the administration determine other options to enforce export controls such as legislative action, allowing the EEIA and EAA to expire would leave the AECA as the only legal authority to enforce export controls of military technology. This would also simplify the list by limiting it to those technologies that are purely military related and by that definition probably eliminate control of any items that are globally available for commercial purposes.

The converse option of vesting single agency approval in State is to move the AECA export control authorities from State to Commerce via executive order. This would align the USML and CCL to the Commerce function and certainly gain synergy with Commerce's enforcement functions. State would retain other responsibilities in the AECA, such as determination of eligibility for defense sales, end use monitoring, negotiating the international export control arrangements, and other reporting requirements, which clearly fall in State's authority for foreign affairs. This would distance export controls from State and almost guarantee strong resistance as a challenge to State primacy in foreign affairs. Even though the EAA directs Commerce to coordinate approval of all export control actions with State, interagency coordination has been one of the persistent problems with the export control system.

The Commerce option sounds straightforward on the surface, but the AECA also states "Under the direction of the President," State has responsibility for foreign policy and "shall be responsible for the continuous supervision and general direction of" actions related to arms exports.⁸⁴ Congress has added various amendments to the AECA that direct specific actions by State reference arms control. These include expediting license applications to Australia and the United Kingdom and ensuring adequate resourcing to execute the export control functions amongst other reporting requirements.⁸⁵ Putting reporting and list alignment mechanisms in place that support these legal requirements would only complicate the already difficult tasks associated with working across departmental lines. Because of the language directing State's oversight of export control actions, unilaterally moving State's authorities to Commerce could be perceived as breaking the law.

Another option would be to establish an export control coordination function similar to the EECC.⁸⁶ This coordinating center would fall under State or Commerce to better coordinate the export control functions. The EAA directs Commerce to establish a license application adjudication process with its Operating Committee (OC) and Advisory Committee on Export Policy (ACEP). This would certainly be an infrastructure that would support establishing the coordination function under Commerce. However, establishing State as the lead federal agency is probably the best solution as this more closely aligns with the foreign affairs functions and with the more stringent and critical USML.

Under this option, the EO designating State should also be strengthened to require participation and manning and give State more of a directive role. The current EECC solution appears ad hoc and parochial interests may prevail when agencies are not directed to comply with negotiated solutions. This option should not reduce or otherwise infringe on the roles and responsibilities of the other departments, but it would give one department the authority to adjudicate issues and lead cross government solutions for the entire export function.

Clearly, legislative support for the administration's plan is essential to implement a major overhaul that crosses multiple departments within the Executive Branch and multiple committees in the legislative branch. As complicated as the changes are, and with the multiple stakeholders with interests in the outcome, the President's best option may be to bring all the players together in an executive level commission. The commission could consist of representatives from each of the affected departments, the committees in the House and Senate, industry, academia, and think tanks.

Fortunately, such a forum already exists in the President's Export Council (PEC).⁸⁷ The PEC describes its purpose to advise the President on international trade.

"The President's Export Council (PEC) is the principal national advisory committee on international trade. The Council advises the President of government policies and programs that affect U.S. trade performance; promotes export expansion; and provides a forum for discussing and resolving trade-related problems among the business, industrial, agricultural, labor, and government sectors."⁸⁸

The PEC was originally established via executive order in 1973 and President Obama renewed the charter in September 2009. Membership includes Presidential appointments from the private sector and the "Secretaries of Commerce, Agriculture, Energy, Homeland Security, Labor, State, and Treasury; the Chairman of the Export-Import Bank of the United States; the U.S. Trade Representative; and the Administrator of the Small Business Administration are also members."⁸⁹ The President of the Senate and the Speaker of the House appoint five members of the Senate and House to serve on the committee. The council maintains sub-committees, to include a separately chartered Sub-Committee on Export Administration (PECSEA) to review export control issues. The Council reports to the President through the Secretary of Commerce.⁹⁰

President Obama last addressed the PEC on December 9, 2010, where he announced the status of USML Category VII review, the publication of draft export control criteria and procedures, draft changes to the USML Category VII with the new criteria, and draft rules for applying licensing rules to products by State and Commerce.⁹¹

What is not apparent from the address is whether President Obama is using the PECSEA as a forum to help develop legislation that will meet the needs of government and industry. The President needs to fully engage the PECSEA and give it the

responsibility to develop a comprehensive plan for establishing legislation that meets modern control requirements for clear unambiguous control criteria, creates one enforcement coordination authority, and provides a rapid, transparent approval process. It would include creating a single government infrastructure that provides one agency authority for export controls. Ideally, the recommendation would also include new legislation that replaces the EAA and modifies the AECA, moves the enforcement coordination authorities and resources to one agency and identifies one committee in each of the House and the Senate with primary oversight responsibility.

Recommendation

The Obama Administration should continue its efforts to align the two control lists, develop a single IT infrastructure, and create other efficiencies to reduce license application processing times, actively remove items from the lists based on availability, and improve interagency coordination.

The Obama Administration should continue to manage and coordinate the interagency process through the ECR task force under the direct authority of the Deputies Committee to drive improvements and cut across the departmental walls that have impeded sound interdepartmental coordination in the past. The task force should continue to push the initiatives across the four singularities to set the stage for implementation once the supporting legislation is approved.

Most importantly, the President should engage the PECSEA to negotiate the much needed changes in legislation and government infrastructure that establishes one export control agency, one law enforcement coordination agency, and one set of regulations, with primary oversight from one committee in the House and Senate.

Should legislative support for these sweeping changes fail to materialize, the administration should conduct its own review of the true emergency need to re-authorizing the EAA through the EEIPA. The Administration may determine there is greater value to foreign policy by enforcing just the critical military technology under the USML and it can address export restriction requirements as needed with Congress. It may also find the alignment efforts effectively converge to one list and there really will be no need to maintain the two separate infrastructures and regulations.

In the interim, either the enforcement MOAs should be quickly implemented and enforced, or the EECC EO should be strengthened to give the ICE more authority to direct consolidated enforcement and the EO should direct agency staffing and participation.

Conclusion

The United States export control system is a relic of the Cold War and needs a dramatic overhaul. Business and technology development cycle times are a fraction of what they were in the 1960s and the height of the Cold War. Multiple threats and a global competition in the technology industry require streamlined infrastructures, processes and control definitions that can control what needs to be controlled while maximizing competitive opportunities for American industry.

To its credit, the Obama Administration has embraced the challenge to modernize the system. They have consolidated the definitions of what must be controlled and have started the effort to reduce the number of technologies controlled. Additionally, they have been developing a single information infrastructure. These are sound first steps that set the stage for the final consolidation of the system. Ultimately, however, the complete solution requires congressional support and action to establish

one control agency and one enforcement coordination agency enforcing one coordinated set of laws and supporting regulations.

Congress must act to approve legislation that replaces the antiquated Cold War export control infrastructure with law that acknowledges the competitive realities of today's business and security environments and establishes the export control and enforcement structure to meet those environments.

Without such legislation, the U.S. arms export control system will continue to be a threat to the U.S. technological advantage and an unnecessary hindrance to U.S. industrial global competitiveness. This paper encourages congressional leaders to take up their legislative sword to cut the Gordian Knot of U.S. export controls that fail to safeguard our technological superiority while simultaneously hurting our technological competitiveness.

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⁶⁸ Ms. Oksana Nesterczuk, telephone interview by author.

⁶⁹ Senior White House Official confidential source, telephone interview by author; James Jones, “The Administration’s Export Control Reform Plans Remarks by General Jones, National Security Advisor;” Ms. Oksana Nesterczuk, telephone interview by author.

⁷⁰ United States Government Accountability Office report, *Subject: Export Controls: Agency Actions and Proposed Reform Initiatives May Address Previously Identified Weaknesses, but Challenges Remain*, 8.

⁷¹ The title of the executive order on the White House webpage transposes the words “Coordination” and “Enforcement” from how it is identified in the body of the order and how it is referenced in the August 31, 2010 White House Fact Sheet announcing the status of the reform efforts to include the pending approval of the EECC order. Jason Poblete in his blog describes how the Bush Administration was preparing to establish a similar agency and he used the acronym, “EECC.” Apparently the Bush administration initiative was overcome by the War on Terrorism and other issues and never implemented. He also quotes a 2006 GAO report that recommended an enforcement coordination task force under Commerce and the DHS had responded that “an Export Enforcement Coordination Center within ICE” would be the most expedient option to better coordinate enforcement across the departments. The White House, Office of the Press Secretary, *Executive Order – Export Coordination Enforcement Center*, <http://www.whitehouse.gov/the-press-office/2010/11/09/executive-order-export-coordination-enforcement-center>, (accessed December 8, 2010); White House Fact Sheet, “President Obama Lays the Foundation for a New Export Control System To Strengthen National Security and the Competitiveness of Key U.S. Manufacturing and Technology Sectors;” United States Government Accountability Office, *Export Controls: Challenges Exist in Enforcement of an Inherently Complex System*, GAO-07-265, December 2006, 23 & 25, <http://www.fas.org/asmp/resources/govern/109th/GAO07265.pdf>, (accessed March 5, 2011), quoted in Jason Poblete, “Export Enforcement Coordination Center, A Bush Administration Idea,” blog, September 3, 2010, <http://jasonpoblete.com/2010/09/03/export-enforcement-coordination-center-a-bush-administration-idea/>, (accessed March 5, 2011).

⁷² The White House, Office of the Press Secretary, *Executive Order – Export Coordination Enforcement Center*.

⁷³ Gregory M. Martin, *Enhancing American Interagency Integration for the Global War on Terrorism*, Strategy Research Project (Carlisle Barracks, PA: U.S. Army War College, March 15, 2006), 7.

⁷⁴ The White House, Office of the Press Secretary, *Executive Order – Export Coordination Enforcement Center*.

⁷⁵ Senior White House Official confidential source, telephone interview by author.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Senior White House Official confidential source, telephone interview by author; James Jones, “The Administration’s Export Control Reform Plans Remarks by General Jones, National Security Advisor.”

⁷⁹ Senior White House Official confidential source, telephone interview by author; James Jones, “The Administration’s Export Control Reform Plans Remarks by General Jones, National Security Advisor.”

⁸⁰ Senior White House Official confidential source, telephone interview by author.

⁸¹ The House Committee on Homeland Security, “About the Committee,” <http://homeland.house.gov/about/history-jurisdiction>, (accessed January 28, 2011).

⁸² Belva M. Martin, Acting Director, and John Neumann, Assistant Director, Acquisition and Sourcing Management, United States Government Accountability Office, telephone interview by author.

⁸³ William A. Root, John R. Liebman, and Roszel C. Thomsen II, *United States Export Controls*, 9, 11-12, quoted in National Research Council of the National Academies, Committee on Science, Security, and Prosperity, Committee on Scientific Communication and National Security Development, Security, and Cooperation, Policy and Global Affairs, *Beyond “Fortress America,”: National Security Controls on Science and Technology in a Globalized World*, 60.

⁸⁴ Title 22, *United States Code*, Section 2752., “Coordination with foreign policy, STATUTE, (b),” February 01, 2010, <http://uscode.house.gov/download/pls/22C39.txt>, (accessed October 15, 2010).

⁸⁵ *Bilateral Exchanges and Trade in Defense Articles and Defense Services Between the United States and the United Kingdom and Australia*, Public Law 108-375, division A, Title XII, Section 1225, Oct. 28, 2004, <http://uscode.house.gov/download/pls/22C39.txt>, (accessed October 15, 2010); *Proliferation and Export Controls*, Public Law 106-65, division A, title XIV, Sections 1402-1405, 1408-1412, 113 Statute. 798-804, Section 1403. “Resources for Export License Functions,” Oct. 5, 1999, <http://uscode.house.gov/download/pls/22C39.txt>, (accessed October 15, 2010).

⁸⁶ The National Association of Manufactures (NAM) recommends a permanent interagency committee to conduct annual reviews of policy implementation and performance of the export control infrastructure. It also recommends a permanent interagency panel of experts “to create a new unified control list, determine foreign availability, create country control charts, and review levels of control.” They recommend using the Commerce adjudication process (the OC and ACEP) and extending it to the NSC to resolve interagency issues. Neither of these really put one agency in charge other than the NSC, thereby probably extending the time lines to resolve issues. Further, the proposed solution in this paper goes beyond “annual reviews” and should be a daily active controller of export control related functions and the proximity to foreign relations actions should not be overlooked. The NAM also briefly mentioned establishing a whole new agency, but did not elaborate. The NAM did point out that culture will be the greatest hurdle to any reform and all the processes, structures, and relationships will have to be overhauled to achieve success. The Coalition for Security and Competitiveness recommends that the NSC be established as the final arbitrator for disagreements between the various agencies, but it does not discuss the structure. The National Research Council (NRC) suggests a licensing coordination center that acts as the single face to industry and the other government agencies for the purpose of reviewing and then directing license applications to the correct agency for action. Its power includes determining if a license is even necessary. The center would also include an appeals panel to adjudicate appeals as required. The NRC also recommends this center falls under the direction of the NSC infrastructure to give it legitimacy and authority. NRC discussed and weighed additional options. One was an interagency group that was rejected because it would have no authority; a private sector panel was rejected because it would not be acceptable to the government agencies; and it considered placement of sole responsibility in the Defense Department or any other department. That option was rejected because it would not allow for independence of the center or agency. National Association of Manufactures, “The NAM Blueprint for a 21st Century Export Control Regime;” The Coalition for Security and Competitiveness, “The CSC Issues Recommendations to Create a 21st Century Technology Control System;” National Research Council of the National Academies, Committee on Science, Security, and Prosperity, Committee on Scientific Communication and National Security Development, Security, and Cooperation, Policy and Global Affairs, *Beyond “Fortress America,”: National Security Controls on Science and Technology in a Globalized World*, 8-9.

⁸⁷ Senior White House Official confidential source, telephone interview by author.

⁸⁸ Department of Commerce, International Trade Administration, “About the President’s Export Council,” <http://trade.gov/pec/about.asp>, (accessed February 8, 2011).

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ The White House, Office of the Press Secretary, “Remarks by the President in Meeting with the President’s Export Council,” December 9, 2010, <http://www.whitehouse.gov/the-press-office/2010/12/09/remarks-president-meeting-with-presidents-export-council>, (accessed February 8, 2011).

